Filed 10/19/09 P. v. Carroll CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL JAY CARROLL, Defendant and Appellant.	E047093 (Super.Ct.No. SWF023001) OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge. Affirmed with directions.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant and defendant Daniel Jay Carroll was charged with theft with a prior theft-related conviction (Pen. Code, §§ 484, 666, count 1)[1] and burglary (§ 459, count 2). It was also alleged that defendant had served six prior prison terms. (§ 667.5, subd. (b).) A jury found defendant guilty of counts 1 and 2, and the trial court found true the theft-related prior conviction attendant to count 1. Defendant admitted as true the allegations that he had six prison priors. At sentencing, the court determined count 2 to be the principal count and imposed the midterm of two years. The court also imposed the midterm of two years on count 1, but ordered the term stayed. The court imposed a one-year term for each of the prison prior enhancements, but stayed the terms on prison prior enhancements 1 through 4. The time on prison prior enhancements 5 and 6 was ordered to run consecutive to the sentence in count 2. Thus, the court sentenced defendant to a total of four years in state prison.

On appeal, defendant contends that 1) the court erred when it found no prejudicial juror misconduct, and 2) the court improperly stayed four of the six prison prior enhancements. The People concede, and we agree, that the court erred in staying, rather than striking, the four prison prior enhancements. Otherwise, we affirm.

FACTUAL BACKGROUND

Prosecution Evidence

In June 2007, defendant was hired as a plumbing subcontractor for Jet Plumbing. When subcontractors needed to buy parts for assigned jobs, they could either get the part

[1] All further statutory references will be to the Penal Code unless otherwise noted.

from one of the local hardware stores where Jet Plumbing had an account or go to Home Depot and have the customer service employee call Jet Plumbing's office manager to get the company's credit card number. Around June 14, 2007, a Home Depot employee called Mike Barnes, the owner of Jet Plumbing, and told him that a man had tried to purchase $500 worth of faucets. When the employee told the man she had to call Barnes to authorize the charge, the man turned around and walked out the door. Barnes then checked his company bank account to see if there were any other suspicious charges. He discovered that someone had made an unauthorized purchase of $381 from Lowe's. The items purchased included a garbage disposal, kitchen faucet, and some compression fittings. Barnes called defendant and asked him if he had used the company credit card number to purchase items at Lowe's. Defendant said, "Oh yeah. I was going to tell you about that." None of the items purchased were required for any of the jobs defendant worked on for Jet Plumbing. Barnes told defendant to bring the items to him so he could sell them to a customer and use them. Defendant never brought Barnes the items.

Defense Evidence

Defendant's wife, Peggy Carroll, was the only defense witness. She testified that defendant showed her the garbage disposal and other items at issue. She said the garbage disposal was in her closet because she "had to put it somewhere." Mrs. Carroll also testified that defendant tried to return the garbage disposal and other items to Lowe's.

During closing arguments, both parties stated that the sole issue in the case was whether defendant had permission to use Jet Plumbing's credit card. Defense counsel did not mention the testimony of defendant's wife in his closing argument.

ANALYSIS

I. There Was No Prejudicial Juror Misconduct

Defendant argues that the verdict must be set aside due to prejudicial juror misconduct. We disagree.

A. *Relevant Background*

Following the noon recess on the second day of trial, Detective John Eneim, who was a prosecution witness, informed the court that he had just observed two of the jurors speaking to Mrs. Carroll, who was a potential witness for the defense. He overheard them discussing animals. The court questioned Mrs. Carroll, who said the jurors sat down beside her and started talking about dogs, and she joined the conversation. Mrs. Carroll said they did not discuss the case at all, and she did not mention who she was during the conversation. The court admonished her not to talk to any of the jurors. The court then interviewed both of the jurors separately. It first questioned Juror No. 5, who confirmed that the conversation was about dogs, and that they did not discuss any matters related to the case. The court questioned Juror No. 10 next. She also said that she and the other juror were talking about dogs, when a woman joined the conversation. Juror No. 10 said the woman did not identify herself, and she "talked about her cancer a lot, but nothing about the case." The court asked Juror No. 10 if she had formed any

opinions about the woman, and Juror No. 10 said she appeared "to be [an] aggressive person— [¶] . . . [¶] . . . who would be the type that would just talk about anything or everything." The court asked Juror No. 10 if she could disregard her contact with the woman and decide the case based only on the evidence presented at trial and the instructions given by the court. The juror said she could and added, "I will disregard everything she has said."

Counsel for both parties expressed concern that the two jurors had built some rapport with Mrs. Carroll and may have some feeling of sympathy since they knew she was battling cancer. The prosecutor initially asked that the two jurors be replaced with the alternates. After conferring with a colleague, the prosecutor then informed the court that the People would be satisfied with an admonition to the jury. Defense counsel asked that at least Juror No. 10 be replaced. The court ruled that, while the contact was improper, it did not constitute juror misconduct. It explained that the conversation in question only concerned topics unrelated to the trial, and it believed the jurors could and would perform their task of deciding the case upon the evidence presented to them. The court thus declined to replace them and then admonished the jury by repeating relevant instructions. The jurors all confirmed that they would follow the court's instruction to not allow anything that happened outside of the courtroom to affect their decision in the case.

B. *Standard of Review*

"On appeal, the determination whether jury misconduct was prejudicial presents a mixed question of law and fact '"subject to an appellate court's independent determination."' [Citation.] We accept the trial court's factual findings and credibility determinations if supported by substantial evidence. [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.)

C. *There Was No Misconduct*

Defendant contends that the court erred when it determined that "an outside conversation between two jurors and a potential defense witness was not misconduct." However, there is no evidence that Juror Nos. 5 and 10 committed misconduct by talking to Mrs. Carroll. "A sitting juror commits misconduct by violating [his or] her oath, or by failing to follow the instructions and admonitions given by the trial court." (*In re Hamilton* (1999) 20 Cal.4th 273, 305.) Defendant has failed to cite any instruction, and we have not discovered any with our own review, that expressly or impliedly stated a juror's duty not to talk to any person outside the courtroom about subjects unrelated to the trial. The record discloses that the jury was told not to "talk about the case or about any of the people or any subject involved in the case with anyone" or to "talk about these things with the other jurors either" until the time for deliberations. The jurors were also told that, during the trial, they were not to "speak to any party, witness, or lawyer involved in the trial," and not to "listen to anyone who trie[d] to talk to [them] about the case or about any of the people or subjects involved in it." Defendant here concedes that

the conversation between the two jurors and Mrs. Carroll was not related to the case. Moreover, Mrs. Carroll did not identify herself to the two jurors in any way during their conversation. Thus, as far as Juror Nos. 5 and 10 were concerned, they were simply talking about dogs, when an unknown woman joined the conversation and said she was a dog breeder. There was clearly no misconduct on the part of the two jurors.

D. *There Was No Prejudice*

Defendant further argues that "after only a short conversation, [Juror No. 10] admitted that she thought Mrs. Carroll was an 'aggressive person,' disclosing a potential bias towards her." Defendant contends that the "aftermath of the interaction left one juror with negative feelings about the only defense witness; thus, the possible presumption of prejudice had been raised." Defendant then asserts that his wife's testimony that he tried to return the items the same day he purchased them addressed "a crucial element of the case, specifically whether [he] intended to deprive Jet Plumbing of the $381.00 for an **extended period of time**." (Bolding in original.) Defendant concludes that "any bias towards the witness would have discredited [his] entire case." Assuming, arguendo, the conversation was misconduct, there was no bias or prejudice.

"'[W]here a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance . . . which suggests a *likelihood* that one or more members of the jury were influenced by improper bias.' [Citation.] . . . Jury misconduct 'raises a rebuttable "presumption" of prejudice.' [Citation.]" (*People v. Tafoya, supra,* 42 Cal.4th at p. 192.) We assess prejudice by a review of the entire record. "The verdict will be set

aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the *defendant*. [Citation.] The judgment must be set aside if the court finds prejudice under either test." (*In re Carpenter* (1995) 9 Cal.4th 634, 653, italics added.)

Here, the objective circumstances did not give rise to a substantial likelihood that the conversation at issue resulted in Juror No. 10's actual bias against defendant. The conversation described by Juror No. 10 was brief and unrelated to the case or defendant. Nothing in the record indicates that Juror No. 10 had negative feelings about Mrs. Carroll, much less about defendant. Juror No. 10 simply stated that Mrs. Carroll appeared "to be [an] aggressive person— [¶] . . . [¶] . . . who would be the type that would just talk about anything or everything." Describing someone as a talkative person does not indicate a negative impression. Furthermore, the ultimate question in determining whether Juror No. 10 was biased was whether she could "'lay aside [her] impression or opinion *and render a verdict based on the evidence presented in court*.' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 580-581.) Juror No. 10 stated she could decide the case based only on the evidence presented, and that she would disregard the contact she had with Mrs. Carroll. Under these circumstances, it is not substantially

likely that Juror No. 10 was actually biased against defendant. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.)

Moreover, contrary to defendant's claim that Mrs. Carroll's testimony addressed a crucial element of the case, the defense theory of the case was that defendant lacked the intent to permanently deprive Jet Plumbing of $381 for an extended period of time. Defense counsel emphasized to the jury that the only issue in dispute was whether defendant had permission to use the company's credit card. Defense counsel did not refer to or rely upon Mrs. Carroll's testimony at all in his closing argument.

We conclude that defendant suffered no prejudice from the alleged juror misconduct.

II. The Court Improperly Stayed Four of the Six Prior Prison Enhancements

Defendant contends that the court erred in staying the four 1-year terms imposed on prior prison enhancements 1 through 4. The People correctly concede.

Section 667.5, subdivision (b) authorizes a trial court to impose a one-year prison term for each prior separate prison term served for any felony, in addition and consecutive to any other prison term imposed. "Once the prior prison term is found true within the meaning of section 667.5[, subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]" (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) In other words, "the court must either impose the prior prison enhancements or strike them. [Citation.]" (*People v. Campbell* (1999) 76 Cal.App.4th 305, 311.)

Here, defendant admitted as true the allegations that he had six prison priors. At sentencing, the court imposed a one-year term for each of the prison prior enhancements, but stayed the terms on prison prior enhancements 1 through 4. The record is clear that the court's intention was not to impose the additional four years to defendant's sentence. The court erroneously stayed those enhancements, instead of striking them. (*People v. Campbell, supra,* 76 Cal.App.4th at p. 311.)

DISPOSITION

The trial court is directed to strike the one-year terms imposed on prison prior enhancements 1 through 4. The court is further directed to prepare an amended abstract of judgment reflecting this modification and to send a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MCKINSTER
J.